

Access Now submission to the United Nations Human Rights Council, on the Universal Periodic Review 2016 Cycle for India

About Access Now

1. Access Now (www.accessnow.org) is an international organisation that works to defend and extend digital rights of users globally. Through representation in 10 countries around the world, including engagement with stakeholders and policymakers in India, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. We engage with an action focused global community, and our Technology Arm operates a 24/7 digital security helpline that provides real time direct technical assistance to users around the world.
2. Access Now advocates an approach to digital security that promotes good security policies that protect user rights, including privacy and freedom of expression. Access Now has worked extensively in India on digital rights including commenting on the ruling on free expression and web blocking, protection of Net Neutrality and government shutdowns of communications networks.
3. This is the third review for India, last reviewed in May 2014 where the Indian government received 170 recommendations in the area of human rights during the review at the Universal Periodic Review mechanism (UPR) in Geneva.

Domestic and international human rights obligations

4. India has signed onto various international human rights instruments, including the [International Covenant on Civil and Political Rights](#) (ICCPR), the [Convention against Torture](#) (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).
5. Chapter III of the Constitution of India provides for judicially enforceable fundamental rights. Of these, Article 19(1)(a) of the Constitution of India establishes a fundamental right to freedom of speech and expression, including the right to information and right to know. Article 14 establishes the right to equality, and Article 21 provides for the right to life and liberty - which has included judicial pronouncements touching upon the right to privacy.

Developments of digital rights in India

7. In March 2015, the Supreme Court of India released a landmark judgment in the case of *Shreya Singhal v. Union of India*, in favor of upholding and advancing the free expression rights of Indian citizens online. The court struck down Section 66A of the Information Technology Act in its entirety as unconstitutional, and restrictively interpreted Section 79 and its regulations — requiring that takedowns of content could

only be sought via court orders or government demands against restricted grounds specified in the constitution.

8. Unfortunately, the Supreme Court chose to not rule against the current website blocking legal regime, saying that the safeguards in the law and its procedure did not appear to violate fundamental rights. This part of the decision is concerning, given that the existing website blocking regime had been often criticised as lacking independent oversight and transparency. The Union Government has not been proactively providing information on website blocking orders - including the total number of blocks or the justifications in particular cases - and has refused to provide this information when queried under applications lodged under the Right to Information Act.
9. In February 2016, the Telecom Regulatory Authority of India (TRAI) announced new rules regarding differential data pricing targeting “zero-rating” programmes, affecting freedom of expression on the internet and Net Neutrality. The rules regulations prohibit telecom service providers from offering discriminatory data tariffs or from entering into arrangements with others to provide such programmes. They will increase competition in telecoms and among internet platforms, allowing smaller providers to gain a foothold.¹ The decision represents a major step toward regulations instituting Net Neutrality, and should be strongly enforced. The Department of Telecom had issued a Report of a Committee on Experts on Net Neutrality in July 2016 which recognised the importance of furthering the free expression potential of the internet and its open nature, calling for further regulatory action to create binding rules to uphold core principles of net neutrality.² The TRAI organised a further pre-consultation on net neutrality in the July 2016; further regulatory proposals are awaited.

Violations of access to information & freedom of expression

8. Authorities in various municipalities and states, including Gujarat,³ Jammu, and Kashmir,⁴ and Haryana,⁵ have ordered local telecommunications and internet service providers to throttle, block, or completely shut down networks. The use of internet shutdowns by authorities is growing, with 8 shutdowns this year itself and over 32 incidents since 2015.⁶ Many of these shutdowns have taken place under orders issued by district or state government authorities under broad interpretations of provisions of the Code of Criminal Procedure, despite the fact of communications being listed as a subject reserved to the Union Government under the Constitution and the existence of

¹ The Guardian, “India deals blow to Facebook in people-powered 'net neutrality' row,” 8 February 2016 <<https://www.theguardian.com/technology/2016/feb/08/india-facebook-free-basics-net-neutrality-row>>.

² <http://www.dot.gov.in/reports-statistics/report-committee-net-neutrality-0>

³ <https://www.accessnow.org/access-urges-officials-in-gujarat-india-to-rescind-internet-disruption>

⁴ <http://www.hindustantimes.com/india-news/kashmir-violence-internet-services-suspended-in-jammu-more-areas-face-shutdown/story-rUSEEAFHJSFFSvbSKWVc7M.html>

⁵ <http://www.ndtv.com/india-news/ahead-of-jat-agitation-internet-services-banned-in-haryanas-sonipat-1415566>

⁶ Centre for Communication Governance, National Law University Delhi

specific legal provisions on network administration under the Telegraph Act 1885 and the web content restriction provision of the Information Technology Act 2000 (as amended in 2008). No Union Government direction or policy statement has been issued so far on the issue of increasing internet shutdowns across different districts and states of India.

9. The international community labels this type of blocking of telecommunications networks and services as an “internet shutdown.”⁷ Research shows that internet shutdowns and human rights infringements go hand-in-hand.⁸ Shutdowns disrupt the free flow of information and create a cover of darkness that allows state and non-state actors to persecute vulnerable groups without scrutiny. They also drastically harm the economy, especially by impacting mobile money transfers.
10. A growing body of jurisprudence declares shutdowns to violate international law. In 2015, experts from the United Nations (UN) Organization for Security and Co-operation in Europe (OSCE), Organization of American States (OAS), and the African Commission on Human and Peoples’ Rights (ACHPR), issued an historic statement declaring that internet “kill switches” can never be justified under international human rights law, even in times of conflict.⁹ In 2016, the Human Rights Council referred to internet shutdowns in its consensus Resolution 32/13, which “*condemns unequivocally* measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law, and calls upon all States to refrain from and cease such measures”.¹⁰
11. The internet has enabled significant advances in health, education, and creativity, and it is now essential to fully realize human rights including participation in elections and access to information. Shutdowns and blocking of internet services delay and deter the benefits of these advances and economic development more broadly, by obstructing trust in the digital economy, undermining access to information, and frustrating personal communications and resources needed for crisis response.

Violations of the right to privacy

⁷ “Fighting Internet Shutdowns” (Access Now) <<https://www.accessnow.org/internet-shutdowns>>

⁸ Sarah Myers West, ‘Research Shows Internet Shutdowns and State Violence Go Hand in Hand in Syria’ (Electronic Frontier Foundation, 1 July 2015) <<https://www.eff.org/deeplinks/2015/06/research-shows-internet-shutdowns-and-state-violence-go-hand-hand-syria>> accessed 18 February 2016.

⁹ Peter Micek, (Access Now 4 May 2015) ‘Internet kill switches are a violation of human rights law, declare major UN and rights experts’ <<https://www.accessnow.org/blog/2015/05/04/internet-kill-switches-are-a-violation-of-human-rights-law-declare-major-un>> accessed 18 February 2016.

¹⁰ A/HRC/RES/32/13 (18 July 2016), available at <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/13>.

12. New legislation passed by Parliament in 2016 expanded government access to the massive Aadhaar database, allowing its use for national security purposes.¹¹ To enhance state surveillance power was not the intended purpose of the identification system, and this legislation opens the door to misuse of the sensitive personal data collected and contained in the database. The expansion of the database itself creates a growing honeypot of valuable data, an attractive target for malicious attackers, who have carried out successful breaches of similar databases in other countries with very costly results.¹² Furthermore, the exception for state access to the Aadhaar database in the Aadhaar Act 2016 undermined existing legal standards, with the Government explicitly moving to a vaguer “national security” ground for surveillance actions in place of the earlier judicially defined and restricted standard of “imminent threat to public order or public emergency”.
13. The Attorney General for India has formally disputed the existence of a fundamental rights to privacy in hearings before the Supreme Court of India, and argued that its legal contours for Indian citizens is unclear - despite Supreme Court rulings over the last three decades upholding a right to privacy falling under the fundamental right to life and liberty under Article 21.¹³ On account of the Attorney General’s motion, the Supreme Court was scheduled for form a larger constitutional bench to decide the question, which is yet to be constituted or hold hearings.

Recommendations

14. India can improve its human rights record and treatment of digital rights in several areas. We accordingly recommend that the government of India:
- a. Commit to enhancing freedom of expression online and preventing violations by state and non-state actors, such as companies;
 - b. Commit to refrain from slowing, blocking, or shutting down internet and telecommunications services, particularly during elections and public assemblies;
 - c. Restrict law enforcement, intelligence agency, and national security authority access to the Aadhaar database and amend the provisions regarding surveillance and access to personal information included in the Aadhaar Act 2016;
 - d. Publicly disclose any procurement of or contracts to purchase, maintain, or operate surveillance technology;
 - e. Improve cooperation with United Nations treaty mechanisms and issue standing invitations to UN special procedures such as the UN special rapporteurs on freedom of expression and privacy;

¹¹ <http://in.reuters.com/article/india-aadhaar-privacy-fears-idINKCN0WI2JW>

¹² http://www.theregister.co.uk/2014/10/14/south_korea_national_identity_system_hacked

¹³ <http://www.ndtv.com/india-news/right-to-privacy-not-a-fundamental-right-centre-tells-supreme-court-784294>

- f. Enact laws and telecommunications regulations protecting access to information and preventing network discrimination, also known as Net Neutrality; and
 - g. Strongly enforce the TRAI regulation banning discriminatory telecom data tariffs or from entering into arrangements with others to provide such programmes.
15. The UPR is an important U.N. process aimed at addressing human rights issues all across the globe. It is a rare mechanism through which citizens around the world get to work with governments to improve human rights and hold them accountable to international law. Access Now is grateful to make this submission.
16. For additional information, please contact Access Now staff Peter Micek (peter@accessnow.org).